

JODY COLT on behalf of )  
KIM CASEY COLT (deceased), )  
 ) Case No. C10-1292-MJP-BAT  
Plaintiff, )  
 )  
v. ) **REPORT AND**  
 ) **RECOMMENDATION**  
 )  
MICHAEL J. ASTRUE, Commissioner of the )  
Social Security Administration, )  
 )  
Defendant. )

Jody Colt, on behalf of Kim Casey Colt (deceased),<sup>1</sup> seeks review of the denial of his Disability Insurance Benefits applications. Ms. Colt contends the ALJ erred by: (1) failing to find Mr. Colt has a mental impairment at step-two; (2) improperly discounting Dr. Fukuda's opinions; (3) improperly discounting Dr. Fouch's opinions; and (4) improperly discounting Mr. Colt's testimony. Ms. Colt also argues the ALJ, de facto, reopened the initial denial of Colt's prior application. Dkt. 15. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

Mr. Colt was 47 years old on his alleged disability onset date, has a high school

<sup>1</sup> Mr. Colt died on February 2, 2010. Tr. 5.

education, completed welding trade school, and worked as an aerospace welder.<sup>2</sup> He filed a claim for benefits in December 2003. The claim was denied and no further review of that claim was sought. Tr. 49. In May, 2006, he filed another claim for benefits. Tr. 97. The claim was denied initially and on reconsideration.<sup>3</sup> After the ALJ conducted a hearing on April 22, 2009, he issued a decision on May 28, 2009 finding Mr. Colt not disabled. Tr. 19-28. As the Appeals Council denied Mr. Colt's request for review, the ALJ's decision is the commissioner's final decision. Tr. 1.

## II. THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,<sup>4</sup> the ALJ made the following findings:

**Step one:** Mr. Colt has not worked since August 15, 2001. Tr. 24.

**Step two:** Mr. Colt has the following severe impairments: diabetes mellitus and degenerative joint disease. *Id.*

**Step three:** These impairments do not meet or equal the requirements of a listed impairment.<sup>5</sup>

**Residual Functional Capacity:** Mr. Colt can perform the full range of light work. Tr. 25.

**Step four:** Mr. Colt can perform his past work. Tr. 27.

**Step five:** Assuming Mr. Colt cannot perform his past work, there are jobs Mr. Colt can perform; he is therefore not disabled. *Id.*

## III. DISCUSSION

### A. The ALJ's Step-Two Assessment

Dr. Yuko Fukuda, M.D. diagnosed Mr. Colt with bipolar type II disorder. Tr. 280. Ms.

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<sup>2</sup> Tr. 130. 131, 137-38.

<sup>3</sup> Tr. 50, 57.

<sup>4</sup> 20 C.F.R. §§.1520, 416.920.

<sup>5</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 Colt contends the ALJ erred at step-two by failing to applying the “special technique” described  
2 in 20 C.F.R. § 416.920a in assessing this mental impairment. Dkt. 15 at 11. The commissioner  
3 concedes the ALJ did not apply the special technique but argues the failure to do so is harmless.  
4 Dkt. 16 at 7-8.

5 When a claimant raises a colorable claim of mental impairment, the ALJ must follow a  
6 “special technique” to evaluate the plaintiff’s limitations. 20 C.F.R. § 416.920a (2006). If the  
7 claimant has a medically determinable impairment, the ALJ must “rate the degree of functional  
8 limitation resulting from the impairment(s)” for the four broad functional areas: activities of  
9 daily living; social functioning; concentration, persistence and pace; and episodes of  
10 decompensation. 20 C.F.R. § 404.920a(b)(2), (c)(3).

11 An ALJ’s failure to apply the “special technique” generally mandates remand if the  
12 claimant has a “colorable claim of a mental impairment.” *Gutierrez v. Apfel*, 199 F.3d 1048,  
13 1051 (9th Cir. 2002); see also *Selassie v. Barnhart*, 203 Fed. App’x 174, 176 (9th Cir. 2006)  
14 (“The specific documentation requirements, therefore, are not mere technicalities that can be  
15 ignored as long as the ALJ reaches the same result.”); *Behn v. Barnhart*, 463 F. Supp.2d 1043,  
16 1047 (C.D. Cal. 2006) (ALJ’s failure to analyze the plaintiff’s functional limitations calls for  
17 remand).

18 A claim is colorable if it is not “wholly insubstantial, immaterial, or frivolous.” *Cassim*  
19 *v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Since *Gutierrez* was decided, the Social Security  
20 regulations have been amended to allow the ALJ greater discretion over how to publish the  
21 mandated findings. However, even under the amended regulations, the ALJ’s decision must still  
22 incorporate the pertinent findings and conclusions based on the special technique. 20 C.F.R. §  
23 404.1520a(e). The decision must include a specific finding as to the degree of limitation in each

1 of the functional areas. *Id.*

2 Dr. Fukuda, M.D. diagnosed Mr. Colt with bipolar disorder and opined Mr. Colt “may  
3 have trouble with detailed and complex tasks that take more than 30-40 minutes to perform” and  
4 “likely would have difficulty performing work activities on a consistent basis, given his medical  
5 problems.” Tr. 280. The Court concludes Mr. Colt raised a colorable claim of mental  
6 impairment, and the ALJ was thus required to follow the special technique to evaluate the degree  
7 of Mr. Colt’s limitation in each of the functional areas. *Gutierrez*, 199 F.3d at 1051.

8 The commissioner contends the ALJ’s failure to apply the special technique is harmless.  
9 Specifically, the commissioner argues “as a practical matter, the ALJ sufficiently addressed the  
10 required functional finding by giving significant weight to Dr. Fukuda’s opinion.” Dkt. 16 at 8.  
11 The ALJ found the doctor opined Mr. Colt’s “psychiatric symptoms would not prevent him from  
12 working,” that Mr. Colt “could do simple repetitive tasks . . . that he cooked meals and did  
13 household chores,” and that Mr. Colt “would have no difficulties in interacting with co-workers  
14 or accepting instructions from supervisor.” Tr. 25. The commissioner argues these findings  
15 essentially address the requirements of the special technique, and support the ALJ’s step-two  
16 finding that Mr. Colt’s mental impairments are non-severe. Dkt. 16 at 9.

17 Essentially, the commissioner is arguing that even if the ALJ had applied the special  
18 technique, he would have reached the same conclusion and found Mr. Colt’s mental impairments  
19 non-severe. The Court measures this argument against the four broad functional areas the  
20 special technique requires: activities of daily living; social functioning; concentration,  
21 persistence and pace; and episodes of decompensation. 20 C.F.R. § 404.1520a(b)(2), (c)(3).

22 Based on the record in this case, the Court cannot join the commissioner in saying the  
23 ALJ addressed all of the requirements of the special technique, and would have reached the same

1 conclusion had he applied the special technique. The Court’s ability to effectively review the  
2 ALJ’s decision is frustrated by the ALJ’s failure to adhere to the regulations. The decision  
3 indicates Dr. Fukuda believes Mr. Colt can work and touches on a few activities of daily living  
4 and the ability to interact with co-workers. But the decision fails to address the functional areas  
5 of persistence and pace, or episodes of decompensation. As to these two areas, Dr. Fukuda  
6 opined Mr. Colt “may have trouble with detailed and complex tasks that take more than 30-40  
7 minutes to perform” and “likely would have difficulty performing work activities on a consistent  
8 basis, given his medical problems.” Tr. 280. Furthermore, the doctor opined Mr. Colt “likely  
9 would not be able to work a full day or workweek based upon his medical symptoms.” *Id.*

10 The Court therefore cannot conclude the ALJ addressed all of the areas of the special  
11 technique, or that the ALJ would have reached the same conclusion had he utilized the special  
12 technique. Accordingly, the Court finds the ALJ’s failure to use the special technique is not  
13 harmless.

14 **B. Assessment of Dr. Fukuda’s Opinion**

15 Although the ALJ did not find Mr. Colt’s mental condition is a severe impairment, he  
16 nonetheless stated he was giving “significant weight” to Dr. Fukuda’s opinion. Tr. 25. Ms. Colt  
17 argues the ALJ erred by ignoring, without giving any reasons, the doctor’s opinions about Mr.  
18 Colt’s problems with detailed and complex tasks, working on a consistent basis, and likely  
19 inability to work a full day or workweek. Dkt. 15 at 12. The Commissioner contends the ALJ’s  
20 residual functional assessment took into account all of these limitations, and thus any alleged  
21 errors committed by the ALJ are harmless. Dkt. 16 at 9-10.

22 The ALJ’s decision mentions three medical opinions—those of Dr. Fukuda, Dr. Erin  
23 Fouch, M.D. and Dr. Howard Quint, M.D. Drs. Fouch and Quint did not render opinions about

1 Mr. Colt's mental impairments. Dr. Fukuda's opinions about Mr. Colt's mental impairments are  
2 not contradicted by another physician; thus the ALJ may reject Dr. Fukuda's opinions only for  
3 "clear and convincing reasons." *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). An ALJ  
4 does this by setting out a detailed and thorough summary of the facts and conflicting evidence,  
5 stating his interpretation of the facts and evidence, and making findings. *Magallanes v. Bowen*,  
6 881 F.2d 747, 751 (9th Cir. 1989).

7 Here the ALJ failed to address Dr. Fukuda's opinions about Mr. Colt's problems with  
8 detailed and complex tasks, working on a consistent basis, and likely inability to work a full day  
9 or work week. Hence, the commissioner's argument that the ALJ's residual functional  
10 assessment took these limitations into account, is not supported. The ALJ simply stated "Dr.  
11 Fukuda's opinion is consistent with the record as a whole." Tr. 25. However, aside from this  
12 conclusory statement, there is nothing in the ALJ's decision indicating why the findings above  
13 were not discussed, and whether they were disregarded, and if so for what reason. An ALJ must  
14 do more than offer his conclusions; he must also explain why his interpretation, rather than the  
15 treating doctor's interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007)  
16 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

17 Hence the Court concludes the ALJ's assessment that Dr. Fukuda's opinion is "consistent  
18 with the record as a whole" is not supported by substantial evidence because the ALJ failed to  
19 give any reason to disregard the doctor's opinions about all of the effects the impact bipolar  
20 disorder had on Mr. Colt's ability to work. The Court also concludes this error is not harmless.  
21 An error is harmless if it is "inconsequential" to the ALJ's ultimate decision. *Stout v. Comm'r,*  
22 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). Dr. Fukuda's opinions about Mr. Colt's  
23 problems with detailed and skilled work, and working on a consistent basis, clearly undermine

1 the ALJ's step-four finding that Mr. Colt can do his past skilled work as an experimental welder.  
2 Dr. Fukuda's opinions about problems working a full work day or work week undermine the  
3 ALJ's step-five determination that Mr. Colt can perform the full range of light work.  
4 Additionally, Dr. Fukuda's opinion about Mr. Colt's mental problems pertain only to non-  
5 exertional impairments. As such, based on the present record, the ALJ, at step-five, should have  
6 taken testimony from a vocational expert to determine whether Mr. Colt could work in light of  
7 the non-exertional impairments described by Dr. Fukuda. The ALJ did not do so<sup>6</sup> and instead  
8 erred by relying solely on the Medical-Vocational Rules in a finding Mr. Colt can work at step-  
9 five. Accordingly, the Court concludes the ALJ erred in assessing Dr. Fukuda's opinions.

10 **C. Assessment of Dr. Fouch's Opinions**

11 As noted above, the ALJ's decision mentions the medical opinions of three doctors. The  
12 ALJ placed "significant weight" on the opinions of Dr. Quint, an examining doctor who  
13 indicated that Mr. Colt could lift and carry 20 pounds occasionally and 10 pound frequently,  
14 could sit and stand 6 hours in an 8 hour day, and had normal grip strength. Tr. 26. Dr. Quint's  
15 opinions indicate Mr. Colt can perform light work.

16 Dr. Fouch, another examining doctor, opined Mr. Colt could sit 3-4 hours in an 8 hour  
17 day but would need to take frequent breaks, approximately every 10 minutes. The doctor opined  
18 Mr. Colt could stand 1-2 hours in an 8 hour day, needed a cane to walk and could lift no more  
19 than 10 pounds. And finally, the doctor opined Mr. Colt is unable to bend, stoop or crouch at all.  
20 Tr. 312.

21 Ms. Colt argues, and the Court agrees, the ALJ erred in discounting Dr. Fouch's  
22 opinions. As noted above, where contradicted, an ALJ may not reject an examining physician's

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23 <sup>6</sup> The ALJ called a vocational expert but only to testify about the exertional and skill levels of  
Mr. Colt's past work as a welder. Tr. 33-34.

1 opinion without “specific and legitimate reasons” that are supported by substantial evidence in  
2 the record. *Lester v. Chater*, at 830-31. Here, although the opinions of Dr. Fouch and Dr. Quint  
3 are inconsistent, the ALJ gave no reasons to reject or discount Dr. Fouch’s opinions. The ALJ’s  
4 failure to do so is particularly problematic in this case. Both physicians are examining medical  
5 doctors. The record reveals no differences in their qualifications or expertise. Both doctors  
6 performed evaluations for MDSI Physician’s Group using the same format and evaluative  
7 techniques. Under these circumstances, the ALJ had a clear duty to provide legitimate reason  
8 for why he favored Dr. Quint’s opinions over Dr. Fouch’s opinions.

9       Although the ALJ utterly failed to provide specific and legitimate reasons to discount Dr.  
10 Fouch’s opinions, the commissioner argues the ALJ did not err. The commissioner first argues  
11 the ALJ does not have to discuss insignificant or non-probative evidence. Dkt. 16 at 7. This  
12 might be true in the abstract. But as applied here, the argument makes little sense. The ALJ  
13 discussed some of Dr. Fouch’s opinions and thus obviously recognized they had some  
14 significance. Moreover, in Dr. Fouch’s opinion, Mr. Colt is more impaired than Dr. Quint found.  
15 Given this difference, Dr. Fouch’s opinions were significant and probative evidence.

16       Second, the commissioner argues Dr. Fouch’s opinions were rendered after the date last  
17 insured and thus are not probative of Mr. Colt’s condition during the earlier insured period. Dkt.  
18 16 at 6. This was not a reason the ALJ gave to reject Dr. Fouch’s opinion. Thus the  
19 commissioner’s argument is a post-hoc rationalization this Court cannot rely on to affirm the  
20 ALJ. *See Pinto v. Massanari*, 249 F.3d 840, 847-48 (9th Cir. 2001). Moreover, an ALJ may not  
21 reject a medical opinion solely because it was rendered retrospectively. *See, e.g., Morgan v.*  
22 *Comm’r*, 169 F.3d 595, 601 (9th Cir. 1999). Accordingly, the Court cannot rely on the  
23 “retrospective” nature of Dr. Fouch’s opinion to affirm the ALJ.



And third, the commissioner argues the ALJ “implicitly rejected [Dr. Fouch’s] opinion by giving significant weight to Dr. Quint’s opinions.” Dkt. 16 at 7. This argument has no merit. The ALJ is entitled to favor one doctor’s opinion over another doctor’s opinion, but only if the ALJ gives specific and legitimate reasons to do so. The commissioner’s argument merely states what is obvious in the ALJ’s decision—that the ALJ favored Dr. Quint’s opinion over Dr. Foucher’s opinion. This tells the Court nothing about whether there are any specific and legitimate reasons the ALJ relied upon in favoring Dr. Quint’s opinion. Accordingly, it is not a basis to uphold the ALJ’s assessment of Dr. Foucher’s opinions.

**D. The ALJ’s Assessment of Mr. Colt’s Testimony**

There is no evidence of malingering. The ALJ may thus reject Mr. Colt’s testimony regarding his symptoms only by making specific findings stating clear and convincing reasons for doing so. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). “The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion.” *Id.* at 1284 (citation omitted).

The ALJ’s discussion about Mr. Colt’s credibility is sparse. The ALJ stated:

Considering the claimant’s daily living activities, *his lack of credibility as to his functioning to the point of adopting a cane without a medical prescription*, and use of motorcart, and the reports and opinions of the consultative examiners, the claimant is found to be able to do light work.

Tr. 27 (emphasis added). The commissioner argues Mr. Colt’s use of a cane without a prescription is a clear and convincing reason<sup>7</sup> to discredit Mr. Colt’s credibility. Dkt. 16 at 12.

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<sup>7</sup> The Commissioner argues the ALJ gave several clear and convincing reasons to discount Mr. Colt’s testimony. The ALJ gave several reasons to support his conclusion that Mr. Colt can perform light work such as “the claimant’s daily living activities,” use of motorcart, and the reports and opinions of the consultative examiners. Tr. 26. However, the ALJ did not state that these reasons supported a finding that Mr. Colt is not credible. Hence, the Court concludes the

1 The Court is not persuaded by this argument.

2       The fact Mr. Colt uses a cane without a prescription is not dispositive evidence that he  
3 lacks credibility. The Social Security Rulings direct the ALJ to consider the facts of each case,  
4 not whether there is a prescription for a cane. The Rulings direct that, “to find that a hand-held  
5 assistive device is medically required, there must be medical documentation establishing the  
6 need for the device to aid in walking or standing, and describing the circumstances for which it is  
7 needed (i.e., whether all the time, periodically, or only in certain situations; distance and terrain;  
8 and any other relevant information). The adjudicator must always consider the particular facts of  
9 a case.” SSR 96-9p. In this case, Dr. Foucher opined:

10               The claimant uses a cane to walk, and per his report, this helps  
11               with his back pain. I would recommend evaluation by a physical  
12               therapy [sic] to see if there is any other assistive device that might  
                  be more beneficial for him, such as a walker, but for now I do  
                  think that he needs the cane in order to walk.

13 Tr. 312. Dr. Foucher’s opinion that Mr. Colt “needs a cane in order to walk” is medical  
14 documentation establishing the need for an assistive device. The ALJ, however, discounted Mr.  
15 Colt’s testimony by completely misstating Dr. Foucher’s opinion. The ALJ found “Dr. Foucher  
16 stated the claimant did not need the cane in order to walk.” Tr. 26. This is a finding that is  
17 obviously at odds with Dr. Foucher’s actual opinion. There are cases where the ALJ  
18 appropriately discounted a claimant’s credibility because there was no medical evidence  
19 indicating the claimant needed to use of a cane. *See e.g. Verduzco v. Apfel*, 188 F.3d 1087, 1088  
20 (9th Cir. 1999) (ALJ properly rejected allegation claimant needed a cane where there was no  
21 medical evidence he needed a cane and 2 doctors found claimant did not need a cane). This  
22 however, is not such a case. Dr. Foucher opined Mr. Colt needed a cane to walk; thus Mr. Colt’s  
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only reason the ALJ clearly articulated to discount Mr. Colt’s testimony was the use of a cane  
without a prescription.

1 use of a cane without a prescription is not a reason to discount his credibility. Accordingly, the  
2 Court concludes the ALJ erred in discounting Mr. Colt's credibility.

3 **E. Whether the ALJ, De Facto, Reopened the Prior Application**

4 The parties argue over whether the ALJ reopened the first application for benefits Mr.  
5 Colt made in 2003. The commissioner acknowledges "by alleging an onset for a previously  
6 adjudicated period, Plaintiff arguably made an implied motion to request to reopen" but argues  
7 Mr. Croft has not shown "good cause" to do so. Dkt. 16 at 13. The Court, however, agrees with  
8 Mr. Colt's contention that this argument misses the mark. "[W]here the Commissioner considers  
9 'on the merits' the issue of the claimant's disability during the already adjudicated period," then  
10 'a de facto reopening' will be deemed to have occurred, and "the Commissioner's decision as to  
11 the prior period [will be] subject to judicial review." *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir.  
12 1996).

13 Here, the ALJ considered on the merits the issue of Mr. Colt's disability, with an onset  
14 date of August 15, 2001. The record is not clear whether Mr. Colt alleged the same onset date in  
15 his first application. To the extent the two applications have the same onset dates, and thus  
16 involve assessments of disability over the same periods, the Court concludes the ALJ de facto  
17 reopened the issue of Mr. Colt's disability over the already adjudicated period.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court recommends the Commissioner's decision be  
20 **REVERSED** and **REMANDED** for further administrative proceedings. On remand, the ALJ  
21 should: (1) further develop the medical evidence, as necessary; (2) reevaluate the medical  
22 opinions in the record, (3) reassess step two of the evaluation process; (4) reevaluate Mr. Colt's  
23 residual functional capacity; (5) reassess the testimony Mr. Colt has given and (6) reassess steps

1 four and five of the sequential evaluation process with the assistance of a vocational expert if  
2 deemed appropriate. A proposed order accompanies this Report and Recommendation.

3 DATED this 1<sup>st</sup> day of March, 2011.

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6 BRIAN A. TSUCHIDA  
7 United States Magistrate Judge  
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